BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JERALD J. HAATAJA	)	
Claimant	)	
VS.	)	
	)	Docket No. 173,814
GENERAL RIGGERS & ERECTORS, INC.	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requested review of the Award dated September 5, 1995, entered by Administrative Law Judge Shannon S. Krysl. The Appeals Board heard oral argument on February 8, 1996.

APPEARANCES

Robert S. Fuqua of Wichita, Kansas, appeared for the claimant. Douglas D. Johnson of Wichita, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits for a 68 percent work disability. Respondent and its insurance carrier requested this review. The issues now before the Appeals Board are:

(1) Is the March 22, 1995, medical report of Craig T. Coccia, M.D., part of the evidentiary record?

(2) Nature and extent of claimant's injury and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Administrative Law Judge should be affirmed.

(1) Craig T. Coccia, M.D., examined claimant on March 22, 1995, pursuant to Administrative Law Judge Shannon S. Krysl's February 27, 1995, Order. In that Order, the Administrative Law Judge directed:

> "Liberty Mutual to designate a physician in claimant's vicinity in Michigan to evaluate and prescribe treatment, if necessary. The physician to rate and restrict, if appropriate."

In response to the above Order, the respondent selected Dr. Coccia to perform the evaluation. The doctor prepared his medical report dated March 22, 1995, which the Administrative Law Judge considered as part of the evidentiary record.

Respondent and its insurance carrier contend the report was not stipulated into evidence and is, therefore, not properly part of the evidentiary record because it was not supported by the doctor's testimony. The respondent and its insurance carrier rely upon K.S.A. 44-519 which provides:

> "No report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible."

The Administrative Law Judge's statements at the regular hearing indicate she desired an independent medical evaluation. Although it is unclear whether that evaluation

was ordered under then K.S.A. 1994 Supp. 44-510e, because the parties could not agree upon an appropriate functional impairment rating, or under the more general provisions of K.S.A. 44-516, in either event the report becomes part of the evidentiary record.

K.S.A. 1994 Supp. 44-510e(a) provides that an administrative law judge must appoint an independent health care provider to issue an opinion regarding a worker's functional impairment when the worker and employer cannot agree upon the appropriate rating. That statute further provides that the administrative law judge must consider that opinion when determining the award. The recent case of McKinney v. General Motors Corp, 22 Kan. App. 2d 768, 921 P.2d 257 (1996) held that the independent medical examiner's report becomes a part of the evidentiary record without supporting testimony.

K.S.A. 44-516 is more general than K.S.A. 1994 Supp. 44-510e(a) regarding the appointment of a neutral physician and provides:

> "In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct."

K.A.R. 51-9-6 is also relevant to this situation. It provides as follows:

> "If a neutral physician is appointed, the written report of that neutral physician shall be made a part of the record of hearing. Either party may cross examine each neutral physician so employed. The fee of the neutral physician giving such testimony shall be assessed as costs to a party at the administrative law judge's discretion."

Without needing to determine whether the Administrative Law Judge requested the independent medical evaluation under K.S.A. 1994 Supp. 44-510e or K.S.A. 44-516, based upon these statutes and the administrative regulation, Dr. Coccia's report becomes part of the evidentiary record, subject, of course, to either party's right to examine or cross-examine the doctor.

(2) The Appeals Board finds that claimant is entitled to receive permanent partial disability benefits for a 68 percent work disability.

The Appeals Board agrees with the Administrative Law Judge that it is more probably true than not that claimant sustained permanent injury and fractured vertebrae on March 5, 1992, when a 900-pound iron beam fell 40 feet from a ceiling and struck claimant on the head. That conclusion is based upon the medical report dated January 3, 1993, written by S. G. Albert, M.D., claimant's physician in Michigan, as well as

the testimony of Pedro A. Murati, M.D., a physician practicing physical medicine and rehabilitation in Wichita, Kansas.

At claimant's attorney's request, Dr. Murati examined claimant in September 1994. Dr. Murati testified that claimant sustained several fractures in the upper spine, loss of range of motion in the cervical and thoracic spine, and muscle spasm along the lower edge of the trapezius medially. Also, according to certain radiology films or reports which he could not locate at the time of the deposition, Dr. Murati believed claimant had several small disc herniations in the cervical and thoracic spinal areas. After he could not locate or verify the information upon which he relied to diagnose the disc herniations, Dr. Murati rated claimant as having an 11 percent whole body functional impairment comprised of 5 percent for the range of motion loss, 4 percent for an avulsion fracture at the second cervical vertebra, and 2 percent for a fracture at the eighth thoracic vertebra. Although the doctor felt that claimant should be given a short course of physical therapy and later a functional capacity evaluation to gauge improvement, based upon claimant's condition at the time of evaluation Dr. Murati believed claimant could return to work with lifting restrictions of occasional lifting limited to a maximum of 40 pounds, frequent lifting limited to a maximum of 20 pounds, and constant lifting limited to a maximum of 10 pounds. In addition, the doctor completed a document entitled Functional Capacities Evaluation dated September 29, 1994, which indicated claimant, among other things, should not climb ladders, twist, or crawl, and should limit bending, squatting, and kneeling to an occasional basis.

Claimant's personal physician, Dr. Albert, reported that he saw claimant on three occasions, July 14, October 28, and December 8, 1992. At all three visits claimant complained of neck and back pain. This doctor diagnosed chronic cervical sprain with probable degenerative disc disease involving the cervical and thoracic spine, avulsion fracture of the second cervical vertebra and compression fracture of the eighth dorsal vertebra "with injury to spinal connective tissues and [sic] remnants of minor radiculopathy in his right hand, treated, still symptomatic with residuals still present." Dr. Albert wrote that claimant had a 50 percent whole body functional impairment and recommended that claimant refrain from undue stress and from those activities such as heavy lifting, stooping, twisting, and pulling which would aggravate claimant's pain symptoms. Also, the doctor indicated that claimant would no longer be able to perform his former work without aggravating his condition.

Respondent presented the testimony of its medical expert, neurological surgeon Shearman Gilreath, D.O., of Traverse City, Michigan, who examined claimant in November 1993. Dr. Gilreath testified that x-rays taken in April 1992 indicated claimant had a small avulsed fragment of the second cervical vertebra with minimal displacement and a compression fracture of the eighth thoracic vertebra. In addition, the doctor testified that a July 1993 MRI scan revealed claimant had multilevel degenerative dorsal spine changes, old superior end-plate compression fractures of the eighth thoracic vertebra, and mild dorsal midline disc protrusion between the twelfth thoracic and first lumbar and between

the first and second lumbar vertebral levels. Dr. Gilreath's clinical impression was compression fracture of the eighth thoracic vertebra, 20 percent stable; ligamentous and muscular injury resolved; and normal neurological examination. This doctor found no evidence of permanent impairment or any reason why claimant could not return to his former work as an ironworker and welder without restrictions. In his November 18, 1993, letter, the doctor wrote:

> "Based upon my clinical examination, I do feel this man did sustain a compression fracture of T8 at the time of his accident. At present, he is without neurological deficit. Compression fractures are stable ones. Why he has not been rehabilitated to the point that he can return to work is unknown to this examiner. I find no reason why he cannot return back to the work force. He has no permanent neurological deficit as a result of his injury. There is no reason why, with a short (3-4 weeks) aggressive course of physical therapy to the cervical, thoracic and lumbar areas, he could not return to work. I find no permanent disability or reason why, he cannot return to his former job. There is no need of any restrictions. He is able to take care of his own activities of daily living."

Based upon the nature of the accident and claimant's persuasive testimony that he has experienced pain in his mid and upper back since the accident, coupled with Dr. Murati's testimony, the Appeals Board finds that claimant has sustained an 11 percent permanent partial whole body functional impairment as a result of the March 1992 work-related accident. Because of his injuries, claimant has been extremely limited in the nature and extent of the work that he can do. Following the accident, claimant returned to work for the respondent and worked five or six weeks until he requested to be laid off due to his injuries. As of the date of regular hearing in June 1995, it appears the only other work claimant has performed after the accident was a light-duty position where his brother was foreman.

The Appeals Board also finds Dr. Murati's testimony persuasive regarding claimant's work restrictions and limitations. Respondent contends Dr. Murati's restrictions were temporary rather than permanent. The Appeals Board disagrees. A careful review of the doctor's testimony indicates claimant should observe Dr. Murati's medical restrictions as indicated above, but that those restrictions were subject to modification if claimant's condition improved after additional medical treatment. The record is silent as to whether respondent provided claimant with that additional treatment. As in all cases, should claimant's medical condition change, the respondent and its insurer may apply for review and modification pursuant to K.S.A. 44-528.

Because his is an "unscheduled" injury, the determination of permanent partial general disability benefits is governed by K.S.A. 1991 Supp. 44-510e, which provides in part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The Appeals Board finds that claimant's permanent partial general disability is 68 percent which is found by averaging a 75 percent loss of ability to perform work in the open labor market with a 61 percent loss of ability to earn a comparable wage.

Claimant's vocational expert, Jerry Hardin, testified that claimant had lost 70 to 75 percent of his ability to perform work in the open labor market as a result of the March 1992 accident and Dr. Murati's medical restrictions. According to Mr. Hardin, claimant is now limited to sedentary, light, and a portion of the medium categories of labor. Mr. Hardin also believes claimant retains the post-injury ability to earn $280 per week. Respondent's vocational expert, William C. Hosman, interpreted Dr. Murati's restrictions to be only temporary in nature and, therefore, they were not considered in Mr. Hosman's analysis of claimant's losses of ability to perform work in the open labor market or to earn comparable wages.

Based upon the belief that Dr. Murati's medical restrictions are the most appropriate, the Appeals Board finds that claimant has a 75 percent loss of ability to perform work in the open labor market and a 61 percent loss of ability to earn a comparable wage. The wage loss percentage is derived by comparing claimant's stipulated average weekly wage of $713.60 to the $280 which the Appeals Board finds claimant has retained the ability to earn. Averaging the two losses yields 68 percent.

(3) The Appeals Board adopts the Administrative Law Judge's findings and conclusions to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated September 5, 1995, entered by Administrative Law Judge Shannon S. Krysl should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March 1997.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

DISSENT

I respectfully disagree with the majority. I believe K.S.A. 44-519 precludes the admission of Dr. Coccia's medical report.

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BOARD MEMBER

c: Robert S. Fuqua, Wichita, KS
Douglas D. Johnson, Wichita, KS
Office of Administrative Law Judge, Wichita, KS
Philip S. Harness, Director